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No. 99-475

In the Supreme Court of the United States

STANLEY T. TORRES, ET AL., APPELLANTS

v.

MIGUEL M. SABLAN, ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether Congress lawfully approved a government for the Commonwealth of the Northern Mariana Islands, in which one chamber of the bicameral commonwealth legislature provides equal representation to the three principal island communities within the commonwealth and therefore does not conform to the "one person, one vote" principle required for legislative bodies in the States.

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MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-17a) is unreported.

JURISDICTION

The judgment of the district court was entered on May 5, 1999. The notice of appeal was filed on May 5, 1999. The jurisdictional statement was filed on July 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See note 2, *infra*.

STATEMENT

1. This case concerns a challenge to the electoral system of the Commonwealth of the Northern Mariana Islands (CNMI), a chain of islands stretching northward from Guam in the Pacific. The CNMI is an unincorporated territory that exists in a special relationship with the United States; it is neither a State nor an independent nation, but a self-governing commonwealth in union with and under the sovereignty of the United States. See 48 U.S.C. 1801 and note.

a. The CNMI was once part of the Trust Territory of the Pacific Islands, which the United States administered under the auspices of the United Nations trusteeship program. See, *e.g.*, *Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 684-685 (9th Cir.), cert. denied, 467 U.S. 1244 (1984); *Gale* v. *Andrus*, 643 F.2d 826, 828-830 (D.C. Cir. 1980). The Mariana Islands District included three principal island communities, or "municipalities": Saipan, Tinian, and Rota. The residents of those communities ultimately joined together to seek commonwealth status, and they entered into negotiations to that end with the United States. Those negotiations led to a 1975 agreement known as the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. 48 U.S.C. 1801 note; see S. Rep. No. 433, 94th Cong., 1st Sess. (1975); Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1374-1384 (1977) (Willens & Siemer).

The Covenant "defines the relationship between the Commonwealth and the United States, sets up a framework and set of mandates for the Commonwealth Con-

stitution, and provides for the * * * termination of the trusteeship." *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1459 (9th Cir.), cert. denied, 506 U.S. 1027 (1992). The Covenant establishes that, upon termination of the trusteeship, the CNMI became "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States of America." Covenant, Section 101.[1] Changes to certain "fundamental provisions" of the Covenant—including the representational structure of the CNMI legislature, as well as the applicability to the CNMI of the laws and Constitution of the United States—require the consent of both the United States and the CNMI. *Id.*, Section 105.

Congress formally approved the Covenant in March 1976. See Pub. L. No. 94-241, § 1, 90 Stat. 263 (see 48 U.S.C. 1801 and note). In the course of its review, Congress considered, among other things, the history and culture of the Northern Marianas and the negotiations leading up to the Covenant. See S. Rep. No. 433, *supra*, at 23-58; see also *id.* at 65-94 (section-by-section analysis of Covenant). The Covenant was also approved by the Mariana Islands District legislature and by a plebiscite held among the residents of the affected islands. *Id.* at 63-64, 413-414.

The CNMI subsequently adopted a constitution, which was ratified by the people in March 1977, was deemed approved by the government of the United States in October 1977 (see Covenant, Section 202), and became effective on January 9, 1978. See Pres. Proc.

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[1] At the time the covenant was signed, the U.S. trusteeship remained in place. The covenant provided that the CNMI would assume commonwealth status upon termination of the trusteeship. Covenant, Section 101. The trusteeship was terminated on November 3, 1986. Pres. Proc. No. 5564, 51 Fed. Reg. 40,399 (1986).

No. 4534, 42 Fed. Reg. 56,593 (1977). Now that the trusteeship agreement has been terminated, the CNMI is under the sovereignty of the United States. Covenant, Section 101; S. Rep. No. 433, *supra*, at 15.

b. Section 203(c) of the Covenant specifies that the CNMI constitution "will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands." See also Covenant, Section 501(a) and (b) (generally extending Section 1 of the Fourteenth Amendment and certain other constitutional provisions to the CNMI, except that "[t]he applicability of [those] provisions * * * will be without prejudice to the validity of and the power of the Congress of the United States to consent to Section[] 203" and certain other Covenant provisions). The island communities of Rota and Tinian insisted upon that arrangement, see S. Rep. No. 433, *supra*, at 69, and, in its absence, would not have joined the Covenant, see Willens & Siemer, 65 Geo. L.J. at 1400-1401. See also J.S. App. 9a n.7; S. Rep. No. 433, *supra*, at 15-16.

The CNMI constitution fills in the details of this legislative structure. It provides:

> The senate shall consist of nine members with three members elected at large from each of three senatorial districts. The first senatorial district shall consist of Rota, the second senatorial district shall consist of Tinian and Aguiguan, and the third senatorial district shall consist of Saipan and the islands north of it. The senate shall be increased to twelve members and three members shall be elected at

> large from a fourth senatorial district consisting of the islands north of Saipan at the first regular general election after the population of these islands exceeds one thousand persons.

CNMI Const. Art. II, Sec. 2(a).

2. Appellants—two residents of the island of Saipan in the CNMI—brought this lawsuit on July 8, 1997, seeking declaratory and injunctive relief to redress the disparity in population among the CNMI senatorial districts. J.S. App. 5a-6a, 27a. Appellants contend that the disparity violates the Equal Protection Clause of the Fourteenth Amendment because the "malapportioned" senatorial districts dilute the electoral strength of Saipan residents in comparison to that of the residents of Tinian and Rota. An amended complaint named, as defendants, the members and executive director of the CNMI board of elections in their official capacities. *Id.* at 26a-28a. The CNMI, the commonwealth legislature, and the mayors of Rota and Tinian later intervened as defendants. *Id.* at 6a. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Public Law No. 94-241, which approved the Covenant. J.S. App. 6a.

Sitting as a three-judge panel under 28 U.S.C. 2284, the district court granted summary judgment in favor of the defendants. J.S. App. 17a. The court concluded that the Equal Protection Clause did not prohibit Congress from approving the legislative arrangement set forth in the Covenant. In so holding, the court relied on the *Insular Cases*, a line of decisions issued by this Court at the beginning of this century concerning the relationship between the United States and its territories and possessions. See *id.* at 11a-12a n.9.

As the district court explained, the *Insular Cases* distinguish "unincorporated" territories, which are not destined for statehood, from "incorporated" territories, which are so destined. *E.g.*, *Downes* v. *Bidwell*, 182 U.S. 244, 339, 342 (1901) (White, J., concurring). In unincorporated territories, such as the CNMI (see J.S. App. 12a n.10, 16), the Constitution does not apply automatically, but imposes only "those fundamental limitations in favor of personal rights [that are] the basis of all free government." *Dorr* v. *United States*, 195 U.S. 138, 146- 147 (1904) (quoting *Downes*, 182 U.S. at 291 (White, J., concurring)); see J.S. App. 13a. The district court held that the "one person, one vote" principle falls short of that standard because several democratic governments, including the Government of the United States itself, have bicameral legislative arrangements under which one chamber is apportioned by geographic or similar criteria rather than by simple population. J.S. App. 16a-17a. The court therefore concluded that the arrangement created by Section 203(c) is valid and that its approval by Congress was lawful. *Ibid.*

ARGUMENT

The judgment of the district court is correct and should be summarily affirmed. As illustrated by the structure of our own national legislature and by a variety of legislative arrangements in other free countries, the bicameral arrangement created by Section 203(c) does not violate any principle forming "the basis of all free government," and Congress acted lawfully in approving it.[2]

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[2] This Court's jurisdiction rests on 28 U.S.C. 1253, which provides for a direct appeal of any order granting or denying injunctive relief in a case "required by any Act of Congress to be heard

1. This Court has long distinguished between "incorporated" territories, such as Alaska (before its admission to the Union), that are "destined for statehood from the time of acquisition," and "unincorporated" territories, such as Guam, that are not. See *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572, 599 n.30 (1976); see also *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Dorr*, 195 U.S. 138; *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922) (collectively referred to as the *Insular Cases*). In unincorporated territories, the Constitution does not generally apply of its own force, and Congress may exercise its powers under the Territory Clause, U.S. Const. Art. IV, § 3, Cl. 2, to form local governments to suit local needs, limited only by those "principles which are the basis of all free government." *Dorr*, 195 U.S. at 147 (quoting *Downes*, 182 U.S. at 291 (White, J.,

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and determined by a district court of three judges." In turn, 28 U.S.C. 2284(a) provides that such a court shall be convened "when an action is filed challenging the constitutionality of the apportionment of * * * any statewide legislative body." This Court has construed the term "State statutes" in a similar jurisdictional statute (28 U.S.C. 2281 (repealed)) to cover the laws of territorial commonwealths that, while not States, are sufficiently autonomous as to warrant convening a three-judge court out of deference to local laws. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 669-676 (1974); see also 48 U.S.C. 1821(c), 1824 (providing that provisions of Title 28 are generally applicable to District Court for the Northern Mariana Islands). Because the CNMI enjoys such autonomy, we believe that a three-judge court was properly convened and that this Court has appellate jurisdiction over this case. We also believe that the district court correctly rejected the separate jurisdictional challenge (see J.S. App. 18a-24a) based on the mistaken notion that Section 902 of the Covenant provides an exclusive political remedy for any apportionment challenge. See *Reynolds* v. *Sims*, 377 U.S. 533, 553 n.25 (1964); *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964); see also Covenant, Section 903.

concurring)); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("Only fundamental constitutional rights are guaranteed to inhabitants of [unincorporated] territories.") (internal quotation marks omitted); *Corporation of the Presiding Bishop* v. *Hodel*, 830 F.2d 374, 385 (D.C. Cir. 1987) (applying *Dorr* standard), cert. denied, 486 U.S. 1015 (1988).

As appellants concede (J.S. 7), the CNMI is an unincorporated territory. See *Wabol*, 958 F.2d at 1459 n.18 (citing *Atalig*, 723 F.2d at 691 & n.28); see also Covenant, Section 101 (CNMI is "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States of America"); S. Rep. No. 433, *supra*, at 15; Willens & Siemer, 65 Geo. L.J. at 1397-1398. Under the *Insular Cases* doctrine, therefore, the only limitations on Congress's power to approve the CNMI's form of government are "'fundamental' constitutional rights" (*Verdugo-Urquidez*, 494 U.S. at 268) at "the basis of all free government" (*Dorr*, 195 U.S. at 147). The question here is whether the "one person, one vote" principle is such a right, and whether that principle therefore requires undoing the bicameral compromise without which the island communities of Rota and Tinian would not have joined the CNMI. See p. 4, *supra*.[3]

The answer is no. *Reynolds* v. *Sims*, 377 U.S. 533 (1964), upon which appellants principally rely, holds only that the "one person, one vote" principle is constitutionally required in legislative bodies within the

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[3] As the district court noted (J.S. App. 10a-14a), the Ninth Circuit has twice upheld other provisions of the Covenant deeming particular constitutional principles inapplicable to the CNMI. See *Wabol*, 958 F.2d at 1450; *Atalig*, 723 F.2d at 682. This Court denied certiorari in both cases. See *Wabol*, 506 U.S. at 1027; *Atalig*, 467 U.S. at 1244.

States. It nowhere suggests that "free government" is impossible where one house of a bicameral legislature is apportioned by criteria other than simple population. Indeed, any such notion is irreconcilable with the structure of our own federal government, as well as with the structure of a number of free foreign governments.

First, the United States Constitution establishes two Houses of Congress, one of which (the House of Representatives) is apportioned by population, and the other of which (the Senate) is "composed of two Senators from each State." U.S. Const. Art. I, § 3, Cl. 1; see also *id.*, Amend. XVII.[4] The CNMI's legislature follows the same model. Like Congress, it is bicameral, with one chamber representing the residents by population and another, smaller chamber representing geographic components. Like Congress, it exemplifies representative democracy within a polity formed by the conjunction of distinct entities.

Appellants' only response to this point (J.S. 14) is that the "historical and constitutional antecedents" to the composition of the Senate led the *Reynolds* Court to deem the federal example inapplicable to the States. That answer, however, cuts against appellants' position rather than for it. The bicameral structure of Congress, and the different apportionment schemes for the House

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[4] As James Madison explained, the allocation of two Senators to each State presents several advantages. One is the "additional impediment [that state representation in the Senate] must prove against improper acts of legislation. No law * * * can now be passed without the concurrence first of a majority of the people, and then a majority of the states." The Federalist No. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961). In our federal system, representation of the States in the Senate is also "a constitutional recognition of the portion of sovereignty remaining in the individual states." *Ibid.*

and Senate, resulted from "a compromise between the larger and smaller States," which "averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Reynolds*, 377 U.S. at 574; see also *INS* v. *Chadha*, 462 U.S. 919, 950 (1983); The Federalist No. 62 (James Madison), *supra*. Similar considerations led to the design of the CNMI Covenant. Section 203(c) is the product of a compromise between the more populated municipality of Saipan and the less populated municipalities of Tinian and Rota. Without that compromise, those islands would not have been unified in a single commonwealth, and the CNMI would not exist in its present form. See Willens & Siemer, 65 Geo. L.J. at 1400; see also S. Rep. No. 433, *supra*, at 15-16, 69.

In rejecting malapportioned state legislative arrangements, the *Reynolds* Court also reasoned that, unlike the role of States within the federal union, "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities." 377 U.S. at 575. By contrast, "the municipalities of Saipan, Tinian, and Rota are not governmental subdivisions created by the legislature, but are separate island communities with divergent histories, traditions and problems." S. Rep. No. 433, *supra*, at 69 (citing *Reynolds*, 377 U.S. at 575). Although the three islands were not sovereign in the same sense as the States, they had a similar claim to independence, which they gave up when they exercised the right of self-determination inherent in trusteeship and joined in political union with the United States. See Willens & Siemer, 65 Geo. L.J. at 1377 & n.14, 1380. Congress accordingly recognized that the CNMI's "departure from the One Man-One Vote rule thus is

justified under *Reynolds*." S. Rep. No. 433, *supra*, at 69.[5]

Moreover, even apart from the example of the United States Senate, "[s]everal countries that are considered to have 'free government' have a bicameral legislature in which one house is malapportioned." J.S. App. 16a. Such nations include many—such as Australia (equal representation of each state), Brazil (equal representation of each of its states and its federal district), and South Africa (equal representation of each province)—whose second chambers represent constituent parts of the nation. See 2 *World Encyclopedia of Parliaments and Legislatures* 848, 850 (George Thomas Kurian, ed. 1998). Examples of other free countries with distinctive arrangements in their second chambers include the United Kingdom (hereditary peers, until recently) and Italy (former presidents). *Ibid.* Those and similar

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[5] Commentators agree. See Willens & Siemer, 65 Geo. L.J. at 1401-1402 ("[T]hese islands have developed separate communities with customs and traditions distinct from one another. * * * In approving the Covenant, Congress understood and respected the separate island identities and recognized that the Covenant's requirement of equal representation in one house of the Northern Marianas legislature was for this reason fully consistent with the [*Insular Cases*]."); Don A. Farrell, *History of the Northern Mariana Islands* 481 (CNMI Public School System 1991) ("It is important to note that there was not complete cultural and political unity among the islands of the Marianas. The Rotanese culture had developed somewhat apart from that of Saipan. Both were rather different from the culture of the repatriated Chamorros from Yap living on Tinian."); *id.* at 531 ("Tinian and Rota developed along somewhat similar political lines. * * * Rota also developed its own municipal government, again along slightly different lines from either Saipan or Tinian. This is not unexpected as Rota has had a different historical experience than either Saipan or Tinian.").

examples belie appellants' claim that the CNMI's legislative arrangement violates a principle at "the basis of all free government" (*Dorr*, 195 U.S. at 147).

2. Appellants cite extensively from passages in *Reynolds* underscoring the importance of the "one person, one vote" principle as applied to the States. See J.S. 9-13. But the fact that the "one person, one vote" requirement is fundamental in that domestic sense does not mean that it is a "fundamental" right at "the basis of all free government" within the meaning of the *Insular Cases*. As the Ninth Circuit explained in a related context, "the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one." *Atalig*, 723 F.2d at 689; see also *Wabol*, 958 F.2d at 1460. The selective incorporation of the Bill of Rights into the Due Process Clause restricts the conduct of the States and, within our federal system, protects certain rights against infringement by either federal or state action. By contrast, the *Insular Cases* doctrine is designed to preserve Congress's flexibility, under the Territory Clause, to act as it deems appropriate when dealing with unincorporated territories, which are not destined for inclusion within the federal system.[6]

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[6] Appellants rely (J.S. 13-14) on dicta in *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982), that "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." *Id.* at 7-8. In *Rodriguez*, this Court rejected a federal constitutional challenge to Puerto Rico's system of filling interim vacancies in its legislature. The Court did not decide the question presented here, and appellants do not suggest otherwise. Moreover, this Court has extended certain constitutional guarantees to the people of Puerto Rico on the understanding that, although those guarantees might

3. Appellants note that, under Ninth Circuit precedent, the court below could have conducted, but did not conduct (see J.S. App. 14a n.11), a further inquiry into whether application of the "one person, one vote" principle to the CNMI would be "impractical and anomalous." See *Wabol*, 958 F.2d at 1460-1462.[7] Appellants do not clearly contend, however, that the district court *should* have conducted that inquiry. See J.S. 16. And, indeed, such an inquiry would have cut against appellants' position, not for it.

As discussed above, the political compromise underlying Section 203(c) was necessary for political union within the Northern Marianas, and Congress properly "accommodat[ed] the unique social and cultural conditions and values of the particular territory." *Wabol*, 958 F.2d at 1460. The distinct experiences of each of the three principal island communities, as well as the goal

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not be applicable there of their own force, Congress *intended* that they be applied there—and had thus, with respect to Puerto Rico, implicitly "overruled" the "limitation on the application of the Constitution in unincorporated territories." *Torres* v. *Puerto Rico*, 442 U.S. 465, 470 (1979) (cited in *Rodriguez*, 457 U.S. at 7); see also *Examining Board of Eng'rs* v. *Flores de Otero*, 426 U.S. 572, 599 & n.30 (1976) ("The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform."). Here, by sharp contrast, Congress has formally approved the legislative arrangement designated in the Covenant, notwithstanding any "provisions of the Constitution" that might be invoked to the contrary. Covenant, Section 203(c); see Pub. L. No. 94-241, 90 Stat. 263; S. Rep. No. 433, *supra*, at 69.

[7] As the *Wabol* court indicated, the "impractical and anomalous" standard is a means of *preserving* Congress's power under the Territory Clause to "accommodate the unique social and cultural conditions and values of the particular territory." 958 F.2d at 1460-1461. The court highlighted the need for courts to "be cautious in restricting Congress' power in this area." *Ibid.*

of a unified commonwealth, justified Congress's decision to accept the Covenant's provision for their equal representation in the CNMI senate. As trustee, the United States was obligated both to preserve local culture and to respect the right of the Northern Marianas people to exercise self-determination. S. Rep. No. 433, *supra*, at 132 (reprinting trusteeship agreement). The legislative arrangement set forth in Section 203(c) of the Covenant is the product of such self-determination, and, indeed, it is identified as one of the "fundamental provisions of th[e] Covenant" that may be modified only upon the consent of both the United States and the CNMI. Covenant, Section 105. Invalidating it now would undermine the premise on which the CNMI itself was founded. As we have explained, the Constitution does not require that anomalous result.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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